

1985

Republic Insurance Group v. Bonnie Lou Doman and Todd Hadley v. Scott Duke : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

D. Gary Christensen, Heinz J. Mahler; Attorneys for Plaintiff.

Steven L. Payton; Attorneys for Defendant.

Recommended Citation

Brief of Respondent, *Republic Insurance Group v. Doman and Hadley*, No. 198520838.00 (Utah Supreme Court, 1985).
https://digitalcommons.law.byu.edu/byu_sc1/619

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

UTAH SUPREME COURT
BRIEF

UTAH
DOCUMENT
KFU
45.9

1985
DOCKET 20838

IN THE SUPREME COURT

OF THE

STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	BRIEF OF RESPONDENT,
	:	REPUBLIC INSURANCE GROUP
Plaintiff and Respondent,	:	
	:	
-vs-	:	
	:	
BONNIE LOU DOMAN and	:	
TODD HADLEY,	:	Case No. 20838
	:	
Defendants and Respondents,	:	
	:	
-vs-	:	
	:	
SCOTT DUKE,	:	
	:	
Proposed Intervenor and	:	
Appellant.	:	

BRIEF OF RESPONDENT,
REPUBLIC INSURANCE GROUP

D. GARY CHRISTIAN, Esquire
HEINZ J. MAHLER, Esquire
KIPP AND CHRISTIAN, P.C.
Attorneys at Law
600 Commercial Club Building
Salt Lake City, Utah 84111

FELSHAW KING, Esquire
GLEN T. CELLA, Esquire
KING & KING, ESQUIRES
Attorneys at Law
251 East 200 South
Clearfield, Utah 84015

ATTORNEYS FOR PLAINTIFF-RESPONDENT

STEVEN L. PAYTON, Esquire
Attorney at Law
431 South 300 East
Suite 40
Salt Lake City, Utah 84111

ATTORNEYS FOR PROPOSED
INTERVENOR-APPELLANT

ATTORNEYS FOR DEFENDANTS-RESPONDENTS

FILED
DEC 16 1985

IN THE SUPREME COURT

OF THE

STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	BRIEF OF RESPONDENT,
	:	REPUBLIC INSURANCE GROUP
Plaintiff and Respondent,	:	
	:	
-vs-	:	
	:	
BONNIE LOU DOMAN and	:	
TODD HADLEY,	:	Case No. 20838
	:	
Defendants and Respondents,	:	
	:	
-vs-	:	
	:	
SCOTT DUKE,	:	
	:	
Proposed Intervenor and	:	
Appellant.	:	

BRIEF OF RESPONDENT,
REPUBLIC INSURANCE GROUP

D. GARY CHRISTIAN, Esquire
HEINZ J. MAHLER, Esquire
KIPP AND CHRISTIAN, P.C.
Attorneys at Law
600 Commercial Club Building
Salt Lake City, Utah 84111

ATTORNEYS FOR PLAINTIFF-RESPONDENT

STEVEN L. PAYTON, Esquire
Attorney at Law
431 South 300 East
Suite 40
Salt Lake City, Utah 84111

ATTORNEYS FOR DEFENDANTS-RESPONDENTS

FELSHAW KING, Esquire
GLEN T. CELLA, Esquire
KING & KING, ESQUIRES
Attorneys at Law
251 East 200 South
Clearfield, Utah 84015

ATTORNEYS FOR PROPOSED
INTERVENOR-APPELLANT

TABLE OF CONTENTS

	PAGES
TABLE OF AUTHORITIES.....	i
STATEMENT OF ISSUES.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	2
SUMMARY OF ARGUMENT.....	4
I. THE COURT'S DENYING DUKE'S MOTION FOR INTERVENTION SHOULD BE AFFIRMED.....	4
II. THE COURT'S GRANTING REPUBLIC'S MOTION FOR SUMMARY JUDGMENT AGAINST DOMAN AND HADLEY SHOULD BE AFFIRMED.....	5
ARGUMENT.....	6
POINT I DENIAL OF DUKE'S MOTION TO INTERVENE SHOULD BE AFFIRMED.....	6
POINT II THE COURT'S GRANTING REPUBLIC'S MOTION FOR SUMMARY JUDGMENT AGAINST DOMAN AND HADLEY SHOULD BE AFFIRMED.....	14
CONCLUSION.....	22
ADDENDUM	
Amended Complaint, Duke v. Hadley and Doman, Civil No. 35245 (tort action).....	Exhibit A
Complaint for Declaratory Relief.....	Exhibit B
Plaintiff's First Set of Interrogatories, Requests for Admissions and Request for Production of Documents to Defendant Hadley..	Exhibit C

TABLE OF CONTENTS
(Continued)

	PAGES
Motion for Summary Judgment.....	Exhibit D
Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment.....	Exhibit E
Ruling on Motion for Summary Judgment.....	Exhibit F
Ruling on Motion to Intervene.....	Exhibit G
Judgment Dated July 15, 1985.....	Exhibit H
Order Dated July 15, 1985.....	Exhibit I

TABLE OF AUTHORITIES

CASES	PAGES
<u>Auerbach Company vs. Key Security Police, Inc.,</u> 680 P.2d 740 (Utah 1984).....	11
<u>Commercial Block Realty Co. vs. USF&G, 28 P.2d</u> 1081, 83 Utah 414 (Utah 1934).....	16
<u>Franklin Life Insurance Co. vs. Johnson, 157 F.2d</u> 653 (10th Cir. 1946).....	13
<u>Heath Tecna Corp. vs. Sound Systems International,</u> 588 P.2d 169 (Utah 1978).....	15
<u>Lima vs. Chambers</u> 657 P.2d 270 (Utah, 1982).....	7, 11
<u>Marguilles vs. Upchurch, 696 P.2d 1195 (Utah</u> 1985).....	17
<u>Maryland Casualty Co. vs. Pacific Coal and Oil</u> <u>Co., 312 U.W. 270 (1941).....</u>	13
<u>Schmitt vs. Billings, 600 P.2d 516 (Utah 1979)....</u>	20, 21
<u>State vs. Craig, 364 S.W.2d 343 (Mo. App. 1963)...</u>	11
<u>State Farm Fire and Casualty Co. vs. Reuter,</u> 657 P.2d 1231 (Oreg. 1983).....	13
<u>State Farm Mutual Insurance Co. vs. Holt,</u> 531 P.2d 495 (Utah 1975)	11
<u>Utah Farm Bureau Insurance Co. vs. Chugg,</u> 315 P. 2d 277 (Utah 1957), 6 Utah 2d 399.....	10, 11
<u>Whitaker vs. Nichols, No. 18514, filed</u> January 30, 1985, ____ P.2d ____ (Utah 1985)....	21
<u>Wright vs. Brown, 574 P.2d 1154 (Utah 1978).....</u>	15
<u>W.W. and W.B. Gardner, Inc. vs. Parkwest Village,</u> <u>Inc., 568 P.2d 734 (Utah 1977).....</u>	19, 20
<u>Young vs. Barrey, 433 P.2d 846 (Utah 1967).....</u>	11

COURT RULES

	PAGES
Rule 36, Utah Rules of Civil Procedure.....	20, 21

OTHER AUTHORITIES

4 Am.Jur.2d, <u>Appeal and Error</u> , § 173	15
----------------------------------------------	----

IN THE SUPREME COURT
OF THE STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	BRIEF OF RESPONDENT,
	:	REPUBLIC INSURANCE GROUP
Plaintiff and Respondent,	:	
	:	
-vs-	:	
	:	
BONNIE LOU DOMAN and	:	Case No. 20838
TODD HADLEY,	:	
	:	
Defendants and Respondents,	:	
	:	
-vs-	:	
	:	
SCOTT DUKE,	:	
	:	
Proposed Intervenor and	:	
Appellant.	:	

BRIEF OF RESPONDENT, REPUBLIC INSURANCE GROUP

STATEMENT OF ISSUES

1. Should the Court's ruling denying Scott Duke's Motion to Intervene in the declaratory action of Republic Insurance Group vs. Bonnie Lou Doman and Todd Hadley be affirmed?

2. Does Scott Duke have standing to appeal the granting of Republic Insurance Group's Motion for Summary Judgment as against Bonnie Lou Doman and Todd Hadley?

3. Should the Court's ruling granting Republic Insurance Group's Motion for Summary Judgment as against Bonnie Lou Doman and Todd Hadley be affirmed?

STATEMENT OF THE CASE

Scott Duke, (hereafter "Duke"), appeals the Court's denial of his Motion to Intervene in the declaratory action filed by Republic Insurance Group, (hereafter "Republic"), against its insureds, Bonnie Lou Doman, (hereafter "Doman"), and Todd Hadley, (hereafter "Hadley").

Duke also appeals the Court granting Republic's Motion for Summary Judgment against Doman and Hadley.

STATEMENT OF FACTS

1. On July 5, 1983, near Roy, Utah, an altercation occurred between Duke and Hadley, allegedly causing injuries to Duke. (R. 2, ¶¶ 6, 7; R. 43, ¶¶ 1-3)

2. As a result of this incident, Duke filed a lawsuit against Hadley and his mother, Doman, seeking damages for Duke's injuries. (R. 2, 3, ¶ 8)

3. On January 14, 1985, Republic filed a declaratory action against Doman and Hadley seeking a judgment determining that Republic's policy of insurance issued to Doman does not afford coverage to Doman or Hadley in connection with the incident involving Duke and that Republic has

no obligation to defend Hadley and Doman, nor indemnify them for any judgment that may be awarded in favor of Duke in connection with said incident. (R. 1 - 5)

4. In both the declaratory action and the underlying tort action, Doman and Hadley were at all times represented by their counsel, Steven L. Payton. (R. 15 - 20)

5. On February 25, 1985, Republic filed and served upon Doman and Hadley, Interrogatories, Requests for Admissions and Requests for Production of Documents, pursuant to the Utah Rules of Civil Procedure. (R. 21, 23)

6. Doman and Hadley failed to answer or otherwise respond to Republic's discovery requests.

7. April 26, 1985, Republic filed a Motion for Summary Judgment based upon the fact that Republic's Requests for Admissions were deemed "admitted" by Doman and Hadley. (R. 25 - 35)

8. May 8, 1985, Republic filed a Request for Ruling on its Motion for Summary Judgment. (R. 53)

9. May 14, 1985, Duke filed a Motion to Intervene as a defendant in the declaratory action between Republic and its insureds, Doman and Hadley. (R. 55)

10. June 11, 1985, Duke's Motion to Intervene came on for oral argument before the Honorable Douglas L. Cornaby, Judge of the Second Judicial District Court, Davis County, State of Utah. The matter was taken under advisement. (R. 90 - 91)

11. June 20, 1985, the Court ruled on Republic's Motion for Summary Judgment and granted the same on the grounds that Doman and Hadley had refused to respond to Requests for Admissions. (R. 92 - 93)

12. June 20, 1985, the Court also ruled on Duke's Motion to Intervene and denied said Motion. (R. 90 - 91)

13. Pursuant to the Court's rulings, judgment was entered in favor of Republic and against Doman and Hadley dated July 15, 1985. An Order denying Duke's Motion to Intervene was also entered July 15, 1985. (R. 94 - 98)

SUMMARY OF ARGUMENT

I.

THE COURT'S DENYING DUKE'S MOTION FOR INTERVENTION SHOULD BE AFFIRMED.

A. Duke filed a Motion to Intervene on May 14, 1985. A proposed intervenor must accept the pending action as he finds it. On April 26, 1985, Republic had already

filed a Motion for Summary Judgment against Doman and Hadley based on failure to respond to discovery requests including Requests for Admissions. On May 8, 1985, Republic filed a Request for Ruling on its Motion for Summary Judgment pursuant to Rule 2.8 of the Rules of Practice of the Second Judicial District Court. Republic's Motion for Summary Judgment was granted by Ruling dated June 20, 1985. Accordingly, the case was concluded and the Motion to Intervene was moot and correctly denied.

B. Duke's Motion to Intervene was further correctly denied for the reason that Duke is not a proper party to a declaratory action between Republic and its insureds, Doman and Hadley, which action involves a contractual dispute as to whether or not there was coverage under a policy of insurance as relating to a specific event. Duke has no interest in said policy of insurance and no standing to intervene.

II.

THE COURT'S GRANTING REPUBLIC'S MOTION FOR SUMMARY JUDGMENT AGAINST DOMAN AND HADLEY SHOULD BE AFFIRMED.

A. The Court granted Republic's Motion for Summary Judgment for the reason that Doman and Hadley had failed to

respond to Republic's Requests for Admission No. 5. Neither Doman nor Hadley have appealed the Court's granting of summary judgment against them. Duke has no standing and no right to appeal the granting of Republic's Motion for Summary Judgment against Doman and Hadley.

B. Republic's Motion for Summary Judgment was properly granted. Doman and Hadley failed to respond to Republic's Requests for Admissions within the required thirty days. Pursuant to the provisions of Rule 36, Utah Rules of Civil Procedure, Republic's Requests for Admissions are deemed "admitted" and as such, proper grounds for the granting of summary judgment.

ARGUMENT

POINT I

DENIAL OF DUKE'S MOTION TO INTERVENE SHOULD BE AFFIRMED.

A.

On February 25, 1985, Republic filed and served upon Doman and Hadley, Interrogatories, Requests for Admissions and Requests for Production of Documents. Hadley and Doman failed to answer or otherwise respond to these discovery requests.

On April 26, 1985, Republic filed its Motion for Summary Judgment based upon the fact that Republic's Requests for Admissions were deemed "admitted" by Doman and Hadley.

On May 8, 1985, Republic filed a Request for Ruling on its Motion for Summary Judgment pursuant to the provisions of Rule 2.8 of the Rules of Practice of the Second Judicial District Court.

On May 14, 1985, Duke filed his Motion to Intervene.

At the time Duke filed his Motion to Intervene, Republic not only had filed its Motion for Summary Judgment, but had already requested a ruling on the same. Doman and Hadley had refused to respond to Requests for Admissions and the same were therefore deemed "admitted" pursuant to the Utah Rules of Civil Procedure. Since material facts were no longer in dispute, Republic was entitled to summary judgment. No action by Duke if allowed to intervene could have prevented the Court's granting summary judgment to Republic. This Court in Lima vs. Chambers, 657 P.2d 270 (Utah 1982) held:

"When intervention is permitted, the intervenor must accept the pending action as he finds it. His right to

litigate is only as broad as that of the other parties to the action."

Even if allowed to intervene, Duke could do nothing to alter the state of the record as it existed at that time.

At the time Duke's Motion to Intervene was filed, Doman and Hadley were already grossly delinquent in responding to discovery requests and a request for a ruling on Republic's Motion for Summary Judgment had already been filed.

In any event, Duke would have had no right to respond to discovery requests propounded upon another party, specifically Doman and Hadley.

Furthermore, Duke could not respond to such discovery requests on behalf of Doman and Hadley, or otherwise intervene on behalf of Doman and Hadley. It would be improper for Duke and his counsel to intervene on one hand in support of and on behalf of Doman and Hadley, and on the other hand at the same time, proceed with a lawsuit in tort against Doman and Hadley. This constitutes a clear conflict of interest.

Finally, Duke proposes to intervene as a "party defendant". There is no reason for Duke to be a "defendant" in a declaratory action between Republic and its insureds.

Duke is not an insured under the policy in question, nor does he claim to be. Republic Insurance has no cause of action against Duke, has made no claims against Duke, and accordingly, it is inconceivable how Duke can be a "defendant".

At the time Duke filed his Motion to Intervene, Republic had already filed a Motion for Summary Judgment and had requested a ruling thereon. On June 20, 1985, the Court ruled on Republic's Motion for Summary Judgment and granted the same. Subsequently, the Court also ruled on Duke's Motion to Intervene, held that since the case was concluded, that Duke's Motion to Intervene was moot and correctly denied Duke's Motion to Intervene for the reason that there was nothing left to intervene in. The Court's denial of Duke's Motion to Intervene should therefore be affirmed.

B.

Duke argues that he should be allowed to intervene in the declaratory action between Republic and Doman and Hadley for the reason that his interests are not adequately protected.

Republic respectfully submits that Duke has no interest in this lawsuit to protect.

This is a declaratory action, the issue of which is whether or not there is coverage under a policy of insurance as relating to a specific incident. This is strictly a contractual dispute between Republic Insurance and its insureds, Doman and Hadley.

This Court has unequivocally held that a person such as Duke who claims to be damaged or injured as the result of an act of an insured, in this case Doman and Hadley, is not a proper party to an action by the insurer against the insured to determine the insurer's liability under a particular policy.

This Court in Utah Farm Bureau Insurance Company vs. Chugg, 315 P.2d 277 (Utah 1957), 6 Utah 2d 399, held:

" . . . It would have been error to have compelled his [the injured party] joinder even under a most liberal view of Rule 20, Utah Rules of Civil Procedure, and we want to repel any inference which may be drawn from this opinion that one who claims to be damaged by the negligent act of another is a proper party to an action by the insurer of the latter under a public liability policy, whereby a declaratory judgment is sought declaring the legal effect of the terms of such policy.

The transaction involved in this action is one between the insurer and insured, namely their contract. Such contract can be construed without a reference to any liability having accrued thereunder. This being so, there is no issue of law or fact in common between the insurer and the plaintiff or potential plaintiff to a tort action against the insured. The tort victim has no present legal interest in the insurance contract." (Emphasis added)

Although Duke claims that the aforecited holding in Chugg is mere dicta, this Court's decision in Chugg was cited with approval in State Farm Mutual Insurance Company vs. Holt, 531 P.2d 495 (Utah 1975), and again most recently in Auerbach Company vs. Key Security Police, Inc., 680 P.2d 740 (Utah 1984).

Further support is found in Young v. Barrey, 433 P.2d 846 (Utah 1967), 20 Utah 2d 108, wherein this Court held that it is improper to join a "tort" based action and an action in "contract" and further affirmed dismissal of the tort-feasors' insurer as a defendant from a lawsuit by a tort victim against the tort-feasor/insured.

Duke relies on the case of Lima vs. Chambers, 657 P.2d 279 (Utah 1982), and State v. Craig, 364 S.W.2d 343 (Mo. App. 1963), wherein this Court and the Missouri Court

held that an insurer providing uninsured motorist coverage to its insured has a right to intervene in a lawsuit filed by its insured against the uninsured motorist for the reason that the insurer has a direct interest in the lawsuit since it will be liable for damages assessed against the uninsured motorist pursuant to its contractual obligations to its insured.

Republic respectfully submits that Duke's reliance on Lima and similar cases is misplaced. Lima is distinguishable from the case at hand both factually and legally in that an insurer's interest (its liability) is directly affected by the outcome of a lawsuit by its insured against an uninsured motorist, strictly by the terms of the policy.

However, in a declaratory action between an insurer and its insured, the terms of the policy are in dispute. In a declaratory action the issue is the insurer's potential liability and responsibility under the policy. As such, it is strictly a dispute between the insurance company and its insured and a "potential plaintiff" or "tort victim" of an insured have no interest in said insurance contract, and consequently no right to intervene.

Other cases cited by Duke in support of intervention are also not applicable herein.

Franklin Life Insurance Company v. Johnson, 157 F.2d 653 (10th Cir. 1946) held that a "contingent beneficiary" in a life insurance policy is a proper party to a declaratory action by the life insurance company against the primary beneficiary as to coverage. Furthermore, the case dealt with Colorado law, not Utah law.

Maryland Casualty Company v. Pacific Coal & Oil Company, 312 U.S. 270 (1941) does not apply in that it deals with an Ohio statute that authorizes a tort victim who had obtained a judgment against the tort-feasor to proceed directly against the tort-feasor's insurers and that because of this statute, the Supreme Court held that a controversy exists between the insurance company and the tort victim and the insurance company may therefore seek declaratory relief against the tort victim as well as the insured tort-feasor. Since this decision was based upon a specific Ohio statute and no similar Utah statute exists, this case also is not relevant and not applicable.

A similar situation exists in the case of State Farm Fire & Casualty Company v. Reuter, 657 P.2d 1231 (Oreg. 1983) also cited by Duke, wherein the Oregon Court based its decision that a controversy exists between the insurance company and the tort victim of its insured because of an

Oregon statute which authorizes a direct action by a tort victim against the tort-feasor's insurers.

Finally, Duke's claim that should he be denied a right to intervene in the declaratory action, he will be denied recovery for his injuries, has no basis in fact or law.

Duke's claim for injuries is against Doman and Hadley. If successful, he may obtain a judgment against Doman and Hadley. There is no prerequisite of insurance coverage for Doman and Hadley in order for Duke to obtain a judgment against them.

Republic had filed a declaratory action against Doman and Hadley for the purposes of determining a contractual dispute relating to the policy of insurance in question. Duke is a stranger to the policy, has no interest in the policy, and is not a proper party to the declaratory action between Republic and its insureds. Accordingly, the Court's denial of Duke's Motion to Intervene should be affirmed.

POINT II

THE COURT'S GRANTING REPUBLIC'S
MOTION FOR SUMMARY JUDGMENT AGAINST
DOMAN AND HADLEY SHOULD BE AFFIRMED.

A.

Scott Duke has no standing to appeal the Court's granting summary judgment against Doman and Hadley. The Court granted judgment in favor of Republic against Doman and Hadley, not against Duke.

Neither Doman nor Hadley have appealed the judgment against them and said judgment is final and res judicata. Wright vs. Brown, 574 P.2d 1154 (Utah 1978).

Duke has absolutely no standing to appeal the Court's judgment against Doman and Hadley. 4 Am.Jur.2d, Appeal and Error, § 173, states in part:

" . . . Under the general rule, strangers to the action, no matter how much they may be prejudiced by a judgment, decree or order, cannot obtain its review by appeal or error proceedings."

Not only is Duke a complete stranger to this action in that his Motion to Intervene was denied, but it is also patently inappropriate for Duke to appeal a judgment which was not rendered against him.

This Court in Heath Tecna Corporation vs. Sound Systems International, 588 P.2d 169 (Utah 1978), raising the

issue of standing sua sponte held that the defendant/husband had no right to appeal a denial of a motion filed by his defendant/wife. This Court stated:

"We perceive no basis on which defendant has standing to appeal denial of his wife's motion."

Duke cites Commercial Block Realty Company v. USF&G, 28 P.2d 1081, 83 Utah 414 (Utah 1934) in support of his right to appeal summary judgment granted against Doman and Hadley.

However, the Court's holding in Commercial Block Realty supports just the opposite conclusion. The Court states that an order denying the right to intervene is appealable but further states:

"Not only must one be a party to a judgment before he can appeal, but the judgment must be adverse to his interests. In other words, he must be aggrieved or effected by the judgment . . . since the appellant is not a party to the judgment against the surety company, it would have no right to appeal . . . however, the appeal is taken from the judgment dismissing the appellant's answer in intervention because it did not state facts sufficient to constitute a cause in intervention." 28 P.2d at 1082

In the Commercial Block Realty case, the Court's ruling was that the appellant might appeal the denial of its Motion to Intervene, but it cannot appeal the granting of judgment in favor of the plaintiff against the defendant.

In this case, Duke has no right and no standing to appeal a judgment granted against Doman and Hadley.

Duke's attempt to appeal on behalf of Doman and Hadley is especially onerous when considering the fact that Duke is concurrently suing Doman and Hadley.

There can be no clearer conflict of interest than found herein, where Duke and his counsel involved in a lawsuit against Doman and Hadley now propose to appeal on Doman and Hadley's behalf, a judgment granted against them. The Court's frowning upon such obvious conflicts of interest is well demonstrated in the case of Marguilles vs. Upchurch, 696 P.2d 1195 (Utah 1985).

Duke's attempt to appeal the judgment granted to Republic against Doman and Hadley is totally without merit. Duke has no standing to appeal on Doman and Hadley's behalf and consequently, the Court has no jurisdiction as to that portion of the appeal. The impropriety of attempting

to appeal on behalf of Hadley and Doman, while at the same time suing them for damages, is self-evident.

Accordingly, this Court should rule that it has no jurisdiction as to Duke's appeal of the granting of summary judgment to Republic against Doman and Hadley, or in the alternative, the Court's granting summary judgment to Republic as against Doman and Hadley should be affirmed.

B.

Duke states in his Brief that it is imperative that the Court analyze the propriety of the trial court's summary judgment against Doman and Hadley. However, Duke fails to state what he claims is in error in the Court's granting summary judgment to Republic.

Duke presents no argument as to what he considers was improper, nor does he state what relief he is requesting from this Court as to said granting of summary judgment.

In any event, the Court's granting summary judgment on behalf of Republic against Doman and Hadley was proper and should be affirmed.

On February 25, 1985, Republic filed and served upon Doman and Hadley, Interrogatories, Requests for Admissions

and Requests for Production of Documents, pursuant to the Rules of Civil Procedure.

After more than sixty days had passed without any response, Republic filed its Motion for Summary Judgment based upon failure to respond to Requests for Admissions.

Doman and Hadley's failure to answer or otherwise respond to plaintiff's Requests for Admissions within the required thirty days had resulted in the same being deemed "admitted" pursuant to the provisions of Rule 36 of the Utah Rules of Civil Procedure.

As such, Doman and Hadley had admitted each and every material fact at issue in the declaratory action and Republic was entitled to judgment as a matter of law.

In W.W. and W.B. Gardner, Inc. vs. Parkwest Village, Inc., 568 P.2d 734 (Utah 1977), this Court was faced with the situation where the plaintiff filed a Motion for Summary Judgment for defendant's failure to answer Requests for Admissions and the defendant, three days prior to the hearing on the Motion for Summary Judgment, submitted an Affidavit denying the matters deemed admitted by defendant's failure to answer. The trial court granted summary judgment to plaintiff, which action was affirmed by this Court, which held:

" . . . Any matter admitted under Rule 36(a) U.R.C.P. is conclusively established under Rule 36(b).

Under Rule 33, a party has a certain specified time to answer. If he does not, he has failed to answer and the opposing party may appropriately invoke the sanctions. The Court further observed the imposition of sanctions as within the sound judicial discretion of the trial court. (Emphasis original)

. . . There was no significance in the fact plaintiff submitted answers to the propounded questions before the hearing on defendant's motion for sanctions. The Court ruled once the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in interim between the filing of the motion for sanctions and the hearing of the motion." 568 P.2d 737

In Schmitt vs. Billings, 600 P.2d 516 (Utah 1979), this Court held:

"More than 45 days had expired prior to the time plaintiff moved for summary judgment and defendants have not responded to the requests, nor have they moved to withdraw or amend their admissions. Defendants have therefore admitted the matters contained in plaintiff's Requests for Admissions.

. . .

. . . They [did not] apply to the Court for an extension of time in which to respond as would be permissible under Rule 36(a), nor move to amend or withdraw their admissions pursuant to Rule 36(b). There is nothing in the record which would excuse the defendants from the effects of Rule 36(b).

As defendants have admitted all the facts noted, supra., there remains no litigable issue and plaintiff is entitled to judgment against the individual defendants. . . ." 600 P.2d 518, 519

See also Whitaker vs. Nichols, No. 18514, filed January 30, 1985, ___ P.2d ___ (Utah 1985), wherein this Court affirmed its rulings in Schmitt and Gardner.

Republic filed and served upon Doman and Hadley its Requests for Admissions on February 25, 1985.

Doman and Hadley refused to reply to the Requests for Admissions and the same were therefore deemed "admitted".

Republic filed its Motion for Summary Judgment on April 26, 1985, and filed a Request for Ruling on said Motion on May 8, 1985.

Neither Doman nor Hadley ever answered or otherwise responded to Republic's discovery requests.

On June 20, 1985, the Court granted Republic's Motion for Summary Judgment, holding that: "Defendants have admitted each and every material fact at issue in this declaratory action and plaintiff is entitled to judgment as a matter of law."

Judgment was entered in favor of Republic as against Doman and Hadley on July 15, 1985.

This granting of Summary Judgment should be affirmed.

CONCLUSION

At the time Duke filed his Motion to Intervene on May 14, 1985, Republic had already filed its Motion for Summary Judgment against Doman and Hadley and had requested a Ruling thereon. Duke, as a proposed intervenor, must accept the pending action as he finds it. Because of Doman and Hadley's failure to answer Requests for Admissions, all material facts in the case were deemed "admitted" and Republic was entitled to Summary Judgment. Accordingly the case was concluded, the Motion to Intervene was moot and correctly denied.

Furthermore, Duke's Motion to Intervene was correctly denied in that Duke is not a proper party in a declaratory action between Republic and its insurers, Doman and Hadley. Duke has no present interest in said policy of insurance and, therefore, no standing to intervene.


The trial court granted Republic's Motion for Summary Judgment against Doman and Hadley for the reason that they failed to answer or otherwise respond to Republic's discovery requests, including Requests for Admissions. Accordingly, Republic's Requests for Admissions as to any and all material facts at issue were deemed "admitted" and Republic was granted Summary Judgment. Neither Doman nor Hadley have appealed the Court's granting of Summary Judgment against them. Duke has no standing and no right to appeal the granting of Summary Judgment against Doman and Hadley in favor of Republic.

Finally, the Court was correct in granting Republic's Motion for Summary Judgment pursuant to the provisions of Rule 36 for the reason that Doman and Hadley have failed to respond to Republic's Requests for Admissions within the required thirty days, all material facts were deemed "admitted" and as such, proper grounds for the granting of Summary Judgment existed.

Respondent, Republic Insurance Group, therefore respectfully requests that this Court affirm the trial court's denial of Duke's Motion to Intervene and affirm the trial court's granting of Summary Judgment in favor of Republic as against Doman and Hadley, or in the alternative, find that it has no jurisdiction as to that portion of the appeal.

DATED this 16th day of December, 1985.

KIPP AND CHRISTIAN, P.C.



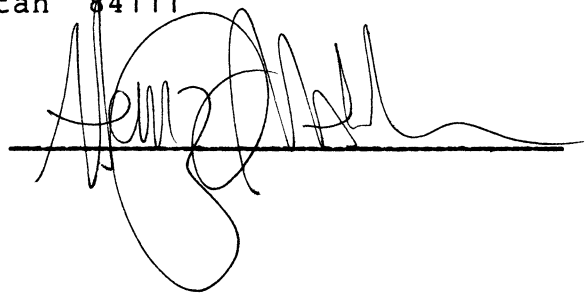
D. GARY CHRISTIAN
HEINZ J. MAHLER
Attorneys for Republic
Insurance Group
Plaintiff and Respondent
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 521-3773

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 16th day of December,
1985, a true and correct copy of the foregoing Brief of
Respondent, Republic Insurance Group, to:

Felshaw King, Esq.
Glenn T. Cella, Esq.
KING & KING, ESQUIRES
Attorneys for Proposed
Intervenor-Appellant
251 East 200 South
Clearfield, Utah 84015

Steven L. Payton, Esq.
Attorney for Defendants-Respondents
431 South 300 East
Suite 40
Salt Lake City, Utah 84111

A handwritten signature in black ink, appearing to read "Steven L. Payton", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke at the end.

KING & KING, ESQUIRES
 FELSHAW KING, ESQUIRE
 Attorneys for Plaintiff
 251 East 200 South
 P. O. Box 220
 Clearfield, Utah 84015
 Telephone: (801) 825-2202

IN THE SECOND JUDICIAL DISTRICT COURT
 OF
 DAVIS COUNTY, STATE OF UTAH

_____	oOo	_____
SCOTT DUKE,)	
	(
Plaintiff,	(	AMENDED COMPLAINT
	(
-vs-)	
	(
TODD HADLEY, BONNIE LOU	)	Civil No. 35245
DOMAN, and JOHN DOE HADLEY,	(
)	
Defendants.	(
_____	oOo	_____

Comes now the Plaintiff and for cause of action
 against the Defendants alleges as follows:

I

That Plaintiff is a resident of Hillsboro, Oregon.

II

That Defendants are residents of Davis County, State
 of Utah.

III

That on or about July 5, 1983, Plaintiff was
 travelling south on Riverdale Road, Roy City, Weber County,
 State of Utah, at approximately 12:30 o'clock A.M.

IV

That while Plaintiff was traveling south on Riverdale Road, a car driven by the Defendant Todd Hadley, drove by Plaintiff's car and without reason or provocation, the Defendant Todd Hadley and passengers in the Defendant's car made threatening and obscene gestures toward the Plaintiff.

V

That at approximately 12:55 a.m., Plaintiff and Defendant Todd Hadley both pulled their vehicles to the side of the road at about 5300 South 1864 West, Roy, Utah, where Plaintiff and Defendant both left their respective vehicles.

VI

That Defendant Todd Hadley emerged from his vehicle armed with a baseball bat or club and that when Plaintiff saw that Defendant Todd Hadley had a baseball bat or club, Plaintiff started to return to his vehicle and was retreating when without reason or provocation, Defendant Todd Hadley hit Plaintiff across the neck and jaw with said baseball bat or club; that the actions of the Defendant Todd Hadley were wilfull, deliberate and malicious.

VII

That as a direct and proximate cause of the injuries inflicted on Plaintiff by Defendant Todd Hadley, Plaintiff received a fractured mandible, cerebral concussion and blunt trauma to the neck.

VIII

That as a result of said injuries, the Plaintiff has received (and in the future will continue to receive) medical and hospital care and treatment furnished by the United States of America. The Plaintiff, for the sole use and benefit of the United States of America under the provisions of 42 U.S.C. 2651-2653, and with its express consent, asserts a claim for the reasonable value of said (past and future) care and treatment.

IX

That as a direct and proximate cause of the said wilfull, deliberate and malicious acts of Defendant Todd Hadley, Plaintiff has incurred special damages for medical expenses and lost wages in an amount yet unknown.

X

That as a direct and proximate cause of the said wilfull, deliberate and malicious acts of Defendant Todd Hadley, Plaintiff has been damaged generally in the sum of One Hundred Thousand Dollars (\$100,000.00).

XI

That as a direct and proximate cause of the wilfull, deliberate and malicious acts of Defendant Todd Hadley, Plaintiff should be awarded punitive damages in the sum of Fifty Thousand Dollars (\$50,000.00).

SECOND CAUSE OF ACTION

XII

Plaintiff refers to the allegations of Paragraph I through XI of the First Cause of action and by reference incorporates them into and makes them a part of this Second Cause of Action.

XIII

That the true name of the father of Todd Hadley is unknown to the Plaintiff, and that he is identified herein as John Doe Hadley and that Bonnie Lou Doman is the mother of Todd Hadley; that Plaintiff will add the true name of Todd Hadley's father to this Complaint when the name is ascertained through discovery.

XIV

That Defendants John Doe Hadley and Bonnie Lou Doman owed a duty and responsibility to Plaintiff to take reasonable measures to prevent Todd Hadley from becoming unnecessarily violent and assaulting Plaintiff with a baseball bat or club; that said duty was breached and as a proximate result of such breach of duty, Plaintiff suffered the injuries and damages alleged herein.

THIRD CAUSE OF ACTION

XV

In the alternative to the First and Second Causes of Action, Plaintiff alleges as follows:

1. That Plaintiff is a resident of Hillsboro, Oregon.

2. That Defendants are residents of Davis County, State of Utah.

3. That on or about July 5, 1983, Plaintiff was travelling south on Riverdale Road, Roy City, Weber County, State of Utah, at approximately 12:30 o'clock A.M.

4. That while Plaintiff was travelling south on Riverdale Road, a car driven by Defendant Todd Hadley, drove by Plaintiff's car and without reason or provocation, the Defendant Todd Hadley and passengers in the Defendant's car made threatening and obscene gestures toward the Plaintiff.

5. That at approximately 12:55 A.M. Plaintiff and Defendant Todd Hadley both pulled their vehicles to the side of the road at about 5300 South 1864 West, Roy, Utah, where Plaintiff and Defendant both left their respective vehicles.

6. That Defendant Todd Hadley emerged from his vehicle carrying a baseball bat or club and Defendant Todd Hadley negligently struck Plaintiff across the neck and jaw with said baseball bat or club.

7. That as a direct and proximate cause of the injuries negligently inflicted on Plaintiff by Defendant Todd Hadley, Plaintiff received a fractured mandible, cerebral concussion and blunt trauma to the neck.

8. That as a result of said injuries, the Plaintiff has received (and in the future will continue to receive) medical and hospital care and treatment furnished by the United States of America. The Plaintiff, for the sole use and benefit of the United States of America under the provisions of 42 U.S.C. 2651-2653, and with its express consent, asserts a claim for the reasonable value of said (past and future) care and treatment.

9. That as a direct and proximate cause of the negligent acts of Defendant Todd Hadley, Plaintiff has incurred special damages for medical expenses and lost wages in an amount yet unknown.

10. That as a direct and proximate cause of the negligent acts of Defendant Todd Hadley, Plaintiff has been damaged generally in the sum of \$100,000.00.

WHEREFORE, Plaintiff prays judgment against Defendants Hadley, John D. Hadley and Bonnie Lou Doman jointly and severally for special damages in an amount yet unknown to Plaintiff, \$100,000.00 general damages and \$50,000.00 punitive damages for liability predicated on the First and Second Causes of Action herein, or, in the alternative, for special damages in an amount yet unknown to Plaintiff and \$100,000.00 in general damages for liability predicated on the Third Cause of Action herein together with such other

and further relief which to the Court may seem proper in the premises.

DATED this 21st day of February, 1985.

KING & KING

By: _____
FELSHAW KING, Esquire
Attorney for Plaintiff
251 East 200 South
P. O. Box 220
Clearfield, Utah 84015

Plaintiff's Address:

142 NE Shannon
Hillsboro, Oregon

-7-

D. GARY CHRISTIAN
HEINZ J. MAHLER

KIPP and CHRISTIAN, P.C.
ATTORNEYS FOR Plaintiff
600 COMMERCIAL CLUB BUILDING
SALT LAKE CITY, UTAH 84111
(801) 521-3773

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	
	:	<u>C O M P L A I N T</u>
Plaintiff,	:	
vs.	:	
BONNIE LOU DOMAN and	:	Civil No. 36730
TODD HADLEY,	:	
Defendants.	:	

Plaintiff, Republic Insurance, complains of defendants
and for cause of action, alleges as follows:

1. That plaintiff is a California corporation engaged
in insurance business, authorized to conduct business within the
State of Utah.

2. That defendants are residents of Davis County, State of Utah.

3. That at all relevant times herein, plaintiff provided certain homeowner's insurance coverage to its insured, Bonnie Lou Doman, pursuant to a Policy No. 515 08 60, insuring premises located at 1269 North 450 West, Sunset, Utah, a copy of which is attached and incorporated herein by this reference.

4. That this action is brought pursuant to the provisions of U.C.A. §78-33-1, et seq., which statutes allow for actions for declaratory judgments.

5. That defendant, Todd Hadley, is the son of defendant, Bonnie Lou Doman, and resided with her at all relevant times herein.

6. That on or about July 5, 1983, defendant, Todd Hadley, was involved in an altercation with Scott Duke, not a party to this action, wherein defendant, Todd Hadley, hit Scott Duke across the neck and jaw with a baseball bat.

7. That the actions of defendant, Todd Hadley, in hitting Scott Duke with a baseball bat, were willful, intentional and deliberate, and that defendant, Todd Hadley, intended to cause injury to Scott Duke.

8. That Scott Duke has filed a Complaint against defendants, Todd Hadley and Bonnie Lou Doman, in the Second Judicial

District Court of Davis County, State of Utah, Civil No. 35245, wherein Scott Duke is seeking damages for injuries incurred by reason of the incident described above.

9. That the causes of action alleged by Scott Duke against Todd Hadley and Bonnie Lou Doman are not within the coverage afforded by the Policy of Insurance issued by plaintiff, Republic Insurance Group, to said defendants and that this plaintiff, Republic Insurance Group, has no obligation to defend Todd Hadley and/or Bonnie Lou Doman in that action nor to pay any amount which may be awarded in favor of Scott Duke and against said defendants herein, or either of them, in said action.

10. That the Policy of Insurance issued by Republic Insurance Group to Bonnie Lou Doman contains exclusionary provisions as follows:

1. Coverage E -- Personal Liability and Coverage F -- Medical Payments to Others do not apply to bodily injury or property damage:

a. which is expected or intended by the insured;

. . .

e. arising out of the ownership, maintenance, use, loading or unloading of:

. . .

(2) a motor vehicle owned or operated by, or rented or loaned by any insured;

10. That this exclusion specifically excludes intentional acts of the type committed by defendant, Todd Hadley, as against Scott Duke, and that therefore, this plaintiff, Republic Insurance Group, has no obligation to defend Bonnie Lou Doman and/or Todd Hadley in the aforementioned action, nor to pay any amount which may be awarded in favor of Scott Duke and against the said defendants herein, or either of them, in said action.

WHEREFORE, plaintiff, Republic Insurance Group, prays for Judgment as follows:

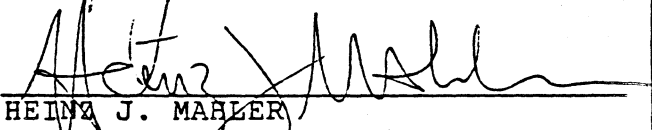
1. That this Court make and enter its Order determining that the Republic Insurance Group Policy No. 515 08 60 issued to Bonnie Lou Doman does not afford coverage to any of the defendants herein under any of its provisions and/or because of its specific exclusions specifically in the case of Scott Duke v. Todd Hadley and Bonnie Lou Doman, Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah; and that this plaintiff has no obligation to defend said defendants herein in the said action nor to indemnify them for any judgment which may be awarded in favor of Scott Duke and against the defendants in said action.

2. For costs incurred.
3. For any other such further relief as the Court may deem just.

DATED this 14th day of January, 1985.

KIPP AND CHRISTIAN, P.C.


D. GARY CHRISTIAN


HEINZ J. MAHLER
Attorneys for Plaintiff
600 Commercial Club Building
32 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 521-3773

Plaintiff's Address:

P.O. Box 3958
Victory Center Annex
No. Hollywood, CA 91606

D. GARY CHRISTIAN
HEINZ J. MAHLER

KIPP and CHRISTIAN, P.C.
ATTORNEYS FOR Plaintiff
600 COMMERCIAL CLUB BUILDING
SALT LAKE CITY, UTAH 84111
(801) 521-3773

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	PLAINTIFF'S FIRST SET OF
	:	INTERROGATORIES, REQUESTS
Plaintiff,	:	FOR ADMISSIONS AND REQUESTS
	:	FOR PRODUCTION OF DOCUMENTS
vs.	:	TO DEFENDANT, TODD HADLEY
	:	
BONNIE LOU DOMAN and	:	Civil No. 36730
TODD HADLEY,	:	
	:	
Defendants.	:	

Pursuant to the provisions of Rules 33, 34 and 36 of the Utah Rules of Civil Procedure, plaintiff submits the following Interrogatories, Requests for Admissions and Requests for Production of Documents to defendant, Todd Hadley, to be answered upon oath and in writing, within thirty (30) days of service thereof.

The Interrogatories are intended to be continuing so as to require a supplementation of response to the full extent specified in Rule 26(e) of the Utah Rules of Civil Procedure.

Defendant is hereby expressly notified that in the event said matters of fact contained hereinafter in plaintiff's Requests for Admissions are denied and plaintiff thereafter proves the genuineness of said matters of fact at trial, or in the event that the Court in a Pre-Trial Sufficiency Hearing on defendant's Responses, determines that the Responses made were inadequate, improper or unjustified, plaintiff shall apply to the above-entitled Court for an order requiring defendant to pay reasonable expenses incurred in making such proof or in determining such insufficiency, including a reasonable attorney's fee pursuant to Rules 33, 36 and 37, inter alia.

INTERROGATORIES

1. Identify all persons who prepared or assisted in preparing the answers to each of the Interrogatories set forth below, including the numbered Interrogatory each such person prepared or assisted in preparing.

2. Identify all persons whom you contacted or who contacted you about any fact involved in this litigation.

3. Identify all persons not previously identified in the preceding Interrogatories who have any knowledge concerning any facts involved in this litigation.

4. State in detail and with particularity your version of how the incident occurred between yourself and Scott Duke on July 5, 1983, which incident is the basis of the Scott Duke v. Todd Hadley, and Bonnie Lou Doman, lawsuit filed in the Second Judicial District Court, Davis County, State of Utah, Civil No. 35245.

5. List the names of all witnesses to the incident in question as described above, including but not limited to any and all persons who were with you and/or occupied your vehicle on the night in question and all persons who were with Scott Duke or occupied his vehicle on the night in question and provide the following information:

- a. Name;
- b. Address and telephone number;
- c. Age;
- d. Occupation.

6. State in detail and with particularity the factual basis for your denial of paragraph 6 of plaintiff's Complaint.

7. State in detail and with particularity the factual basis for your denial of paragraph 7 of plaintiff's Complaint.

8. State in detail and with particularity the factual basis for your denial of paragraph 9 of plaintiff's Complaint.

9. State in detail and with particularity the factual basis for your denial of paragraph 10 of plaintiff's Complaint.

10. State in detail and with particularity the factual basis for your allegation that Republic Insurance has (a) a duty to pay any amount which may be awarded in favor of Scott Duke in the Scott Duke v. Todd Hadley and Bonnie Lou Doman lawsuit, and (b) a duty to provide a defense for you in said lawsuit.

11. State whether or not the incident of July 5, 1983, as described above, between yourself and Scott Duke, resulted in any criminal charges being brought against you (Todd Hadley).

12. If the answer to the preceding Interrogatory is in the affirmative, state the following:

a. The nature of the criminal charges brought against you, including the Utah Code section which you allegedly violated pursuant to said charges;

b. What governmental agency brought said criminal charges against you;

c. Whether or not you were convicted of said criminal charges and if so:

i. State specifically what you were convicted of;

ii. What judgment, fine or penalty was rendered against you;

iii. Whether or not such conviction was appealed by you;

iv. The current status of said conviction.

13. State whether or not as a result of the incident of July 5, 1983, as described above, between yourself and Scott Duke, any criminal charges were filed against Scott Dule.

14. If the answer to the preceding Interrogatory is in the affiramtive, state the following:

a. The nature of the criminal charges brought against Scott Duke, including the Utah Code section which Scott Duke allegedly violated pursuant to said charges;

b. What governmental agency brought said criminal charges against Scott Duke;

c. Whether or not you were convicted of said criminal charges and if so:

i. State specifically what Scott Duke was convicted of;

ii. What judgment, fine or penalty was rendered against Scott Duke;

iii. Whether or not such conviction was appealed by Scott Duke;

iv. The current status of said conviction.

15. State whether or not you or any other passengers in your automobile were consuming alcoholic beverages at the time the incident with Scott Duke occurred, or had consumed alcoholic beverages within six (6) hours prior to the occurrence of the accident, including:

- a. Who consumed the alcoholic beverages;
- b. How much was consumed by each person;
- c. At what time of day were the alcoholic beverages consumed;
- d. Where the alcoholic beverages consumed were obtained.

17. State your age, weight and height at the time the incident with Scott Duke occurred.

18. State your permanent place of residence during the year 1983.

19. State the factual basis for your denial of each of the admissions set forth below regardless of whether each such denial is in whole or in part of each such admission, including but not limited to the identity of all persons having knowledge or possessing documentation which would tend to support said denial. For convenience purposes, said basis should be included in your response to the applicable admission.

ADMISSIONS

1. Admit that on or about July 5, 1983, at the approximate location of 5300 South 1864 West, Roy, Utah, you hit or struck Scott Duke about the face and/or neck area with a baseball bat or similar instrument.

2. Admit that when you hit or struck Scott Duke about the face and/or neck area with a baseball bat or similar instrument as described above, you did so intentionally, specifically that the same was an intentional and voluntary act on your part.

3. Admit that by hitting or striking Scott Duke about the face and/or neck area with a baseball bat or similar instrument as described above, you did so with the intent and purpose of causing injury to Scott Duke.

4. Admit that by virtue of your intentional act of striking or hitting Scott Duke about the face and/or neck area with a baseball bat or similar instrument, Republic Insurance has no duty to defend you and the lawsuit filed by Scott Duke, specifically Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, entitled Scott Duke v. Todd Hadley and Bonnie Lou Doman.

5. Admit that by virtue of your intentional act of

striking or hitting Scott Duke about the face and/or neck area with a baseball bat or similar instrument, Republic Insurance has no duty to pay or indemnify you for any judgment rendered against you in the lawsuit filed by Scott Duke, specifically Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, entitled Scott Duke v. Todd Hadley and Bonnie Lou Doman.

6. Admit that as a result of the incident of July 5, 1983, with Scott Duke as more particularly described above, you were convicted of committing a crime, specifically assault, or a related charge.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1. Any and all documents which support or substantiate in any way answers to the preceding Interrogatories or Requests for Admissions.

2. Any and all documents which you will use as exhibits at trial.

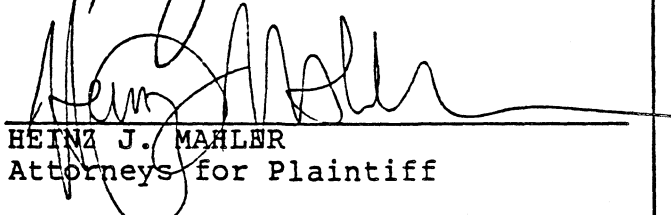
3. A complete copy of the Policy of Insurance issued to Bonnie Lou Doman by plaintiff, Policy No. 515-08-60, insuring the premises located at 1269 North 450 West, Sunset, Utah.

DATED this 25th day of February, 1985.

KIPP AND CHRISTIAN, P.C.



D. GARY CHRISTIAN



HEINZ J. MAHLER
Attorneys for Plaintiff

D. GARY CHRISTIAN
HEINZ J. MAHLER

KIPP and CHRISTIAN, P.C.
ATTORNEYS FOR Plaintiff
600 COMMERCIAL CLUB BUILDING
SALT LAKE CITY, UTAH 84111
(801) 521-3773

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

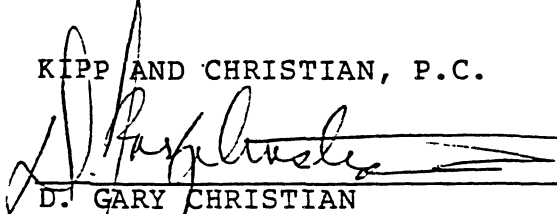
REPUBLIC INSURANCE GROUP,	:	
	:	MOTION FOR SUMMARY JUDGMENT
Plaintiff,	:	
vs.	:	
BONNIE LOU DOMAN and	:	Civil No. 36730
TODD HADLEY,	:	
Defendants.	:	

Plaintiff moves this Court for Summary Judgment pursuant to Rule 56 of the Utah Rules of Civil Procedure.

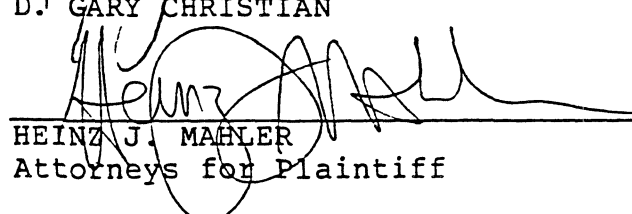
This Motion is based upon the record on file and the accompanying Memorandum of Points and Authorities establishing plaintiff is entitled to Judgment as a matter of law.

DATED this 26th day of April, 1985.

KIPP AND CHRISTIAN, P.C.



D. GARY CHRISTIAN

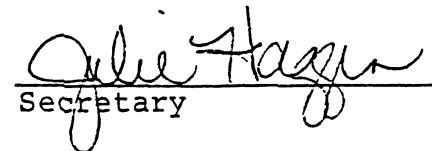


HEINZ J. MAHLER
Attorneys for Plaintiff

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 26th day of April, 1985,
a true and correct copy of the foregoing Motion for Summary
Judgment, to:

Steven Lee Payton
Attorney for Defendants
431 South 300 East, Suite 40
Salt Lake City, Utah 84111



Secretary

D. GARY CHRISTIAN
HEINZ J. MAHLER

KIPP and CHRISTIAN P.C
ATTORNEYS FOR Plaintiff
600 COMMERCIAL CLUB BUILDING
SALT LAKE CITY, UTAH 84111
(801) 521-3773

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	MEMORANDUM OF POINTS AND
	:	AUTHORITIES IN SUPPORT OF
Plaintiff,	:	PLAINTIFF'S MOTION FOR
	:	SUMMARY JUDGMENT
vs.	:	
BONNIE LOU DOMAN and	:	Civil No. 36730
TODD HADLEY,	:	
	:	
Defendants.	:	

Plaintiff, Republic Insurance Group, by and through its counsel, D. Gary Christian and Heinz J. Mahler, of Kipp and Christian, P.C., submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment.

FACTS

The facts insofar as they are relevant to this Motion are as follows:

1. On January 14, 1985, plaintiff filed a Complaint against defendants by way of a declaratory action, alleging that the Republic Insurance policy issued to Bonnie Lou Doman does not afford coverage to Bonnie Lou Doman or to Todd Hadley under any of its provisions and/or because of its specific exclusions as to the case of Scott Duke v. Todd Hadley and Bonnie Lou Doman, Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, and that accordingly, Republic Insurance Group and its member companies have no obligation to defend Bonnie Lou Doman or Todd Hadley in said action nor to indemnify them for any judgment which may be awarded in favor of Scott Duke and against the defendants.

2. On February 25, 1985, plaintiff filed and served upon defendants, Bonnie Lou Doman and Todd Hadley, Interrogatories, Requests for Admissions and Requests for Production of Documents, pursuant to the Utah Rules of Civil Procedure. A copy of the same is attached and incorporated herein by this reference.

3. More than sixty (60) days have passed since the Interrogatories, Requests for Admissions and Requests for Production of Documents have been filed and defendants, and each of them, have refused to answer or otherwise respond to said Interrogatories, Requests for Admissions and Requests for Production of Documents.

ARGUMENT

PLAINTIFF'S REQUESTS FOR ADMISSIONS ARE
DEEMED "ADMITTED" BY DEFENDANTS' FAILURE
TO RESPOND TO THE SAME.

Plaintiff submitted the following Requests for Admissions to defendant, Todd Hadley:

"1. Admit that on or about July 5, 1983, at the approximate location of 5300 South 1864 West, Roy, Utah, you hit or struck Scott Duke about the face and/or neck area with a baseball bat.

2. Admit that when you hit or struck Scott Duke about the face and/or neck area with a baseball bat or similar instrument as described above, you did so intentionally, specifically and that the same was an intentional and voluntary act on your part.

3. Admit that by hitting or striking Scott Duke about the face and/or neck with a baseball bat or similar instrument as

described above, you did so with the intent and purpose of causing injury to Scott Duke.

4. Admit that by virtue of your intentional act of striking or hitting Scott Duke about the face and/or neck area with a baseball bat or similar instrument, Republic Insurance has no duty to defend you and the lawsuit filed by Scott Duke, specifically Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, entitled Scott Duke v. Todd Hadley and Bonnie Lou Doman.

5. Admit that by virtue of your intentional act of striking or hitting Scott Duke about the face and/or neck area with a baseball bat or similar instrument, Republic Insurance has no duty to pay or indemnify you for any judgment rendered against you in the lawsuit filed by Scott Duke, specifically Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, entitled Scott Duke v. Todd Hadley and Bonnie Lou Doman.

6. Admit that as a result of the incident of July 5, 1983, with Scott Duke as more particularly described above, you were convicted or committing a crime, specifically assault, or a related charge."

Plaintiff submitted the following Requests for Admissions to defendant, Bonnie Lou Doman:

"1. Admit that by virtue of the intentional act of Todd Hadley of striking or hitting Scott Duke about the face and/or neck area with a baseball bat or similar

instrument, Republic Insurance has no duty to defend you in the lawsuit filed by Scott Duke, specifically Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, entitled Scott Duke v. Todd Hadley and Bonnie Lou Doman.

2. Admit that by virtue of the intentional act of Todd Hadley of striking or hitting Scott Duke about the face and/or neck area with a baseball bat or similar instrument, Republic Insurance has no duty to pay or indemnify you for any judgment rendered against you in the lawsuit filed by Scott Duke, specifically Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, entitled Scott Duke v. Todd Hadley and Bonnie Lou Doman."

Defendants' failure to answer or otherwise respond to Plaintiff's Requests for Admissions within the required thirty (30) days, has resulted in the same being admitted, pursuant to the provisions of Rule 36 of the Utah Rules of Civil Procedure.

As such, defendants have admitted each and every material fact at issue in this declaratory action and plaintiff is entitled to judgment as a matter of law.

It should also be noted that should defendants attempt to submit Answers to Plaintiff's Requests for Admissions belatedly, subsequent to the filing of this Motion, such an attempt would be to no avail. The matters have already been deemed admitted and such admission is now conclusive.

In W.W. and W.B. Gardner, Inc. v. Parkwest Village, Inc., 568 P.2d 734 (Utah 1977) the Court was faced with a situation where the plaintiff filed a Motion for Summary Judgment for defendant's failure to answer Requests for Admissions and the defendant, three days prior to the hearing on the Motion for Summary Judgment, submitted an Affidavit denying the matters deemed admitted by defendant's failure to answer. The Court granted Summary Judgment to plaintiff, which action was affirmed by the Supreme Court, which held:

" . . . Any matter admitted under Rule 36a U.R.C.P. is conclusively established under Rule 36b.

. . . Under Rule 33, a party has a certain specified time to answer. If he does not, he has failed to answer and the opposing party may appropriately invoke the sanctions. The court further observe the imposition of sanctions as within the sound judicial discretion of the trial court. (Emphasis original)

. . . There was no significance in the fact plaintiff submitted answers to the propounded questions before the hearing on defendant's motion for sanctions. The court ruled once the motion for sanctions has been filed, the opposing party may not preclude their imposition by making a belated response in the interim between the filing of the motion for sanctions and the hearing of the motion." 568 P.2d 737 (Emphasis added)

The Court also held that a motion by the party, having failed to answer the Requests for Admissions to withdraw the admission or amend the admission, must be made prior to the moving party's Motion for Summary Judgment for failure to answer and furthermore, that sanctions under Rule 37 or by way of Summary Judgment may be granted by the Court without the necessity of the moving party first filing a Motion For an Order Compelling Discovery.

In Schmitt v. Billings, 600 P.2d 516 (Utah 1979) the Court held:

"More than 45 days had expired prior to the time plaintiff moved for summary judgment and defendants have not responded to the requests, nor have they moved to withdraw or amend their admissions. Defendants have therefore admitted the matters contained in plaintiff's requests for admissions . . .

. . . They [did not] apply to the court for an extension of time in which to respond as would be permissible under Rule 36a, nor move to amend or withdraw their admissions pursuant to Rule 36b. There is nothing in the record which would excuse the defendants from the effects of Rule 36b.

As defendants have admitted all the facts noted, supra., there remains no litigable issue and plaintiff is entitled to judgment against the individual defendants. . . ." 600 P.2d 518, 519

See also Whitaker v. Nichols, No. 18514, filed January 30, 1985, _____ P.2d _____ (Utah 1985) wherein the Court affirmed its rulings in Schmitt and Gardner.

CONCLUSION

By their failure to answer Plaintiff's Requests for Admissions within the time allowed under the Utah Rules of Civil Procedure, defendants have admitted all relevant facts at issue in connection with the declaratory action.

These admissions are dispositive of the issues of this case. There are no material facts left in dispute in this matter and Summary Judgment should be granted to plaintiff as a matter of law.

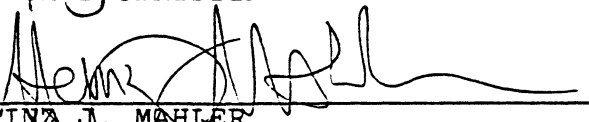
Any belated effort by defendants to respond to plaintiff's discovery requests, including Requests for Admissions, would be to no avail and improper. See Gardner, supra., and Schmitt, supra.

Plaintiff, therefore, respectfully requests this Court to grant its Motion for Summary Judgment.

DATED this 26th day of April, 1985.

KIPP AND CHRISTIAN, P.C.

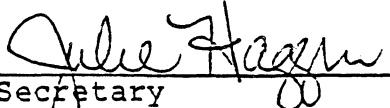

D. GARY CHRISTIAN


HEINZ J. MAHLER
Attorneys for Plaintiff

CERTIFICATE OF MAILING

MAILED, postage prepaid, this 26th day of April, 1985, a true and correct copy of the foregoing Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, to:

Steven Lee Payton
Attorney for Defendants
431 South 300 East, Suite 40
Salt Lake City, Utah 84111


Secretary

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

REPUBLIC INSURANCE GROUP,)	
Plaintiff,	)	RULING ON MOTION FOR
vs.	)	SUMMARY JUDGMENT
BONNIE LOU DOMAN, et al.,	)	Civil No. 36730
Defendant.)	

The plaintiff's motion for summary judgment was filed with the court on April 26, 1985. The defendants did not respond to the motion. On May 8, 1985, the plaintiff filed a motion requesting the court to rule on its motion for summary judgment pursuant to Rule 2.8 of the Rules of Practice and waived oral argument. On May 14, 1985, Scott Duke filed a motion for intervention as a defendant. On June 11, 1985, both Heinz J. Mahler, counsel for the plaintiff, and Steven Lee Payton, counsel for the defendants were before the court on a motion by Scott Duke to intervene in this action. Neither counsel indicated any intention of doing anything more with regard to the motion for summary judgment. The court now rules on the motion for summary judgment.

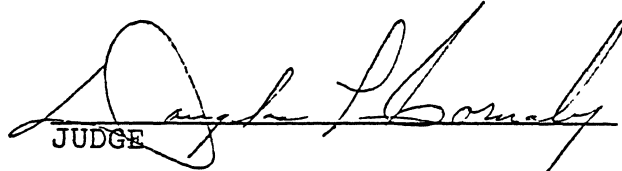
On February 25, 1985, the plaintiff served upon defendants Interrogatories, Requests for Admissions and Requests for Production of documents. Over three months have passed and neither defendant has responded to said requests. The defendants' failure to answer or otherwise respond to plaintiff's requests for admissions within the required thirty days has resulted in the same being admitted, pursuant to the provisions of Rule 36 of the Rules of Civil Procedure. As such, defendants have admitted each and every material fact at issue in this declaratory action and plaintiff is entitled to judgment as a matter of law.

The plaintiff's motion for summary judgment is granted.

The plaintiff is directed to draw a formal order in conformity with this ruling.

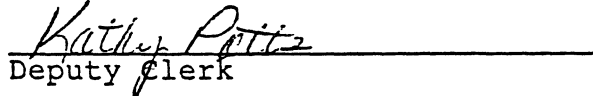
Dated June 20, 1985.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Heinz J. Mahler, 600 Commercial Club Building, Salt Lake City, Utah 84111; Steven Lee Payton, 431 South 300 East, Suite 40, Salt Lake City, Utah 84111; and Felshaw King, P. O. Box 220, Clearfield, Utah 84015 on June 21, 1985.


Deputy Clerk

In the District Court of the Second Judicial District

IN AND FOR THE

County of Davis, State of Utah

REPUBLIC INSURANCE GROUP,)	
Plaintiff,	)	RULING ON MOTION
vs.	)	TO INTERVENE
BONNIE LOU DOMAN, et al.,	)	Civil No. 36730
Defendant.)	

The motion of Scott Duke to intervene came before the court on June 11, 1985, for oral argument, with Felshaw King appearing for Scott Duke, Heinz J. Mahler appearing for the plaintiff and Steven Lee Payton appearing for the defendants. After oral argument, the court took the motion under advisement. The court now rules on the motion.

Scott Duke relies heavily on the case of Lima vs. Chambers, 657 P.2d 279 (Utah, 1982). In that case the Supreme Court said:

"When intervention is permitted, the intervenor must accept the pending action as he finds it; his right to litigate is only as broad as that of the other parties to the action." (657 P.2d at 284-5)

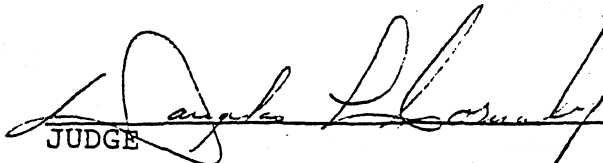
Irrespective of whether Scott Duke is a proper party to this action or not, he must accept the case as it is. What is the status of the case. On April 26, 1985, the plaintiff filed a motion for summary judgment. The defendants failed to respond to that motion. On May 8, 1985, the plaintiff filed a request for ruling on its motion for summary judgment pursuant to Rule 2.8 of the Rules of Practice and waived oral argument. The defendants have not responded to this motion. The case is, therefore, in a position for a ruling on the motion for summary judgment. This court has this day ruled on plaintiff's motion for summary judgment and has granted the same. Since the plaintiff

has been granted summary judgment, there is nothing left for Scott Duke to intervene in.

The motion of Scott Duke to intervene in this action is denied.

Dated June 20, 1985.

BY THE COURT:


JUDGE

Certificate of Mailing:

This is to certify that the undersigned mailed a true and correct copy of the foregoing Ruling to Heinz J. Mahler, 600 Commercial Club Building, Salt Lake City, Utah 84111; Steven Lee Payton, 431 South 300 East, Suite 40, Salt Lake City, Utah 84111; and Felshaw King, P. O. Box 220, Clearfield, Utah 84015. on June 21, 1985.

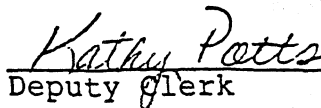

Deputy Clerk

EXHIBIT 4H

FILED IN CLERK'S OFFICE
DAVIS COUNTY, UTAH

1985 JUL 15 AM 10:49

MICHAEL G. ALLPHIN, CLERK
2ND DISTRICT COURT

BY _____
DEPUTY CLERK

D. GARY CHRISTIAN
HEINZ J. MAHLER
KIPP and CHRISTIAN PC
ATTORNEYS FOR Plaintiff
600 COMMERCIAL CLUB BUILDING
SALT LAKE CITY, UTAH 84111
(801) 521-3773

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	
Plaintiff,	:	JUDGMENT
vs.	:	
BONNIE LOU DOMAN and	:	Civil No. 36730
TODD HADLEY,	:	
Defendants.	:	U-72
	:	U-140B

Plaintiff's Motion for Summary Judgment filed April 26, 1985, came on regularly before the Honorable Douglas L. Cornaby, Judge of the above-entitled Court, the Court being fully advised in the premises and pursuant to the Court's ruling on Motion for Summary Judgment dated June 20, 1985,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the Republic Insurance Policy #5150860 issued to Bonnie Lou Doman does not afford or in any provide coverage to Bonnie Lou Doman nor to Todd Hadley in the case of Scott Duke vs. Todd Hadley and Bonnie Lou Doman, Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah.

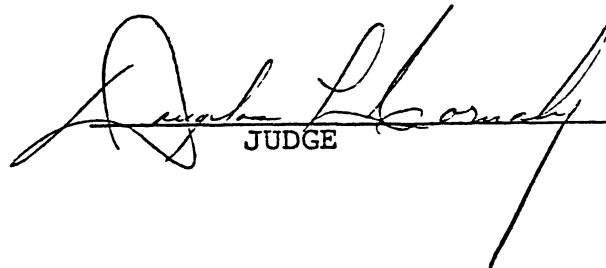
FILMED

2. That neither the Republic Insurance Group nor any of the individual insurance company members of the group have any obligation to defend or otherwise represent Bonnie Lou Doman nor Todd Hadley in the case of Scott Duke vs. Todd Hadley and Bonnie Lou Doman, Civil No. 35245, filed in the Second Judicial District Court, Davis County, State of Utah, nor to pay or indemnify them for any judgment which may be awarded in favor of Scott Duke and against the defendants in said action.

3. For costs incurred in the sum of \$72.75.

DATED this 15 day of July, 1985.

BY THE COURT:


JUDGE

STATE OF UTAH
COUNTY OF DAVIS)ss-

I THE UNDERSIGNED, CLERK OF THE DISTRICT COURT OF DAVIS COUNTY, UTAH DO HEREBY CERTIFY THAT THE ANNEXED AND FOREGOING IS A TRUE AND FULL COPY OF AN ORIGINAL DOCUMENT ON FILE IN MY OFFICE AS SUCH CLERK

WITNESS MY HAND SEAT OF SAID OFFICE

THIS 15 DAY July 1985

MICHAEL G. ALLPHIN, CLERK

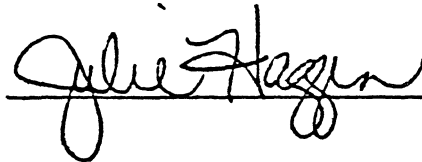
BY Christopher W. Uda

CERTIFICATE OF MAILING

MAILED, postage prepaid, pursuant to Rule 2.9, this
24th day of June, 1985, a true and correct copy of the foregoing
Judgment, to the following:

Steven Lee Payton
Attorney for Defendants
Suite 40
431 South 300 East
Salt Lake City, Utah 84111

Felshaw King
Attorney for Scott Duke
251 East 200 South
Clearfield, Utah 84015



D. GARY CHRISTIAN
HEINZ J. MAHLER
KIPP and CHRISTIAN PC
ATTORNEYS FOR Plaintiff
600 COMMERCIAL CLUB BUILDING
SALT LAKE CITY, UTAH 84111
(801) 521-3773

IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY
STATE OF UTAH

REPUBLIC INSURANCE GROUP,	:	
Plaintiff,	:	ORDER
vs.	:	
BONNIE LOU DOMAN and	:	
TODD HADLEY,	:	Civil No. 36730
Defendants.	:	

The Motion of Scott Duke to Intervene in this matter came on regularly before the Court on June 11, 1985. Scott Duke represented by Felshaw King, plaintiff Republic Insurance Group represented by Heinz J. Mahler and defendants represented by Steven Lee Payton, the Court having heard the argument of the parties and being fully advised in the premises, and pursuant to the Court's ruling on Motion to Intervene dated June 20, 1985;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. That the Motion of Scott Duke to Intervene in this action is denied.

DATED this 15th day of July, 1985.

BY THE COURT:

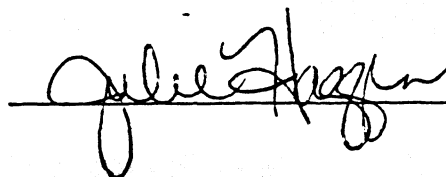
12/ Carter

CERTIFICATE OF MAILING

MAILED, postage prepaid, pursuant to Rule 2.9, this
24th day of June, 1985, a true and correct copy of the foregoing
Order, to the following:

Steven Lee Payton
Attorney for Defendants
Suite 40
431 South 300 East
Salt Lake City, Utah 84111

Felshaw King
Attorney for Scott Duke
251 East 200 South
Clearfield, Utah 84015

A handwritten signature in cursive script, appearing to read "Julie Hayner", is written over a horizontal line.

KING & KING, ESQUIRES
 FELSHAW KING, ESQUIRE
 Attorneys for Intervenor
 251 East 200 South
 P. O. Box 220
 Clearfield, Utah 84015
 Telephone: (801) 825-2202

IN THE SECOND JUDICIAL DISTRICT COURT
 of
 DAVIS COUNTY, STATE OF UTAH

	oOo	
REPUBLIC INSURANCE GROUP,)	
	(
Plaintiff-Respondent,	)	NOTICE OF APPEAL
	(
-vs-)	
	(
BONNIE LOU DOMAN and)	
TODD HADLEY,	(
	)	Civil No. 36730
Defendants-Respondents,	(
)	
and	(
)	
SCOTT DUKE,	(
)	
Proposed Intervenor	(
and Appellant.)	
	oOo	

NOTICE IS HEREBY GIVEN that Scott Duke, Proposed Intervenor and Appellant above named, hereby appeals to the Supreme Court of the State of Utah from the Judgment filed July 15, 1985, and Order denying Motion to Intervene dated July 15, 1985.

DATED this 13th day of August, 1985.

KING & KING

By: Felshaw King
 FELSHAW KING, Esquire
 Attorney for Intervenor
 251 East 200 South
 P. O. Box 220
 Clearfield, Utah 84015

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy
of the foregoing NOTICE OF APPEAL to:

D. GARY CHRISTIAN, Esquire
HEINZ J. MAHLER, Esquire
Attorneys at Law
600 Commercial Club Building
Salt Lake City, Utah 84111

STEVEN L. PAYTON, Esquire
Attorney at Law
431 South 300 East
Suite 40
Salt Lake City, Utah 84111

postage prepaid, this 13th day of August, 1985.

S/ SHARON SEDMONS
Secretary